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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-372

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
v.
ALVIN JOHNSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on April 21, 1976 (rehearing denied June 3, 1976).

OPINIONS BELOW

The Michigan Court of Appeals by an order of November 21, 1973, granted the Petitioner's Motion to Affirm, and said order is appended as Appendix "A". The opinion of the Michigan Supreme Court is reported at 396 Mich 424; 240 NW 2d 729 (1976), and is appended as Appendix "B".

STATEMENT OF JURISDICTION

The order of the Michigan Court of Appeals granting Petitioner's Motion to Affirm was entered November 21, 1973. Application for Leave to Appeal by Respondent was granted by the Michigan Supreme Court on June 25, 1974. The judgment of the Michigan Supreme Court reversing Respondent's conviction was entered on April 21, 1976. Petitioner's Application for Rehearing was denied June 3, 1976. The jurisdiction of this court is invoked under 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

I

18-CrL 4074

Whether, in view of *Menna v New York*, ___ US ___ 96 S Ct 241,46 L Ed 2d 195 (1975), a counseled plea of guilty to an offense lesser than that originally charged, the plea being the result of a plea bargain, bars assertion on appeal of the Fifth Amendment double-jeopardy clause, as applicable to the states through the Fourteenth Amendment.

II

Whether the Fifth Amendment to the United States Constitution forbids a finding of consent to a mistrial absent an affirmative declaration to that effect on the record.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Defendant Alvin Johnson, along with codefendant Eddie Perkins, was charged with armed robbery. Two days into the trial counsel for the defendant Johnson asked a prosecution witness, a police officer:

> "Q. Didn't he (Alvin Johnson) deny he was implicated, involved in the alleged holdup?"

"A. Yes, he did."

"Q. Did he also ask you whether or not he could submit to a lie detector test?" (t-243).

The prosecutor immediately objected and moved for a mistrial (t-244). Counsel for codefendant Perkins joined in the motion, with counsel for defendant Johnson remarking "All I can say is I didn't realize it was improper" and "I feel kind of small." (t-245). The following day the prosecutor withdrew his motion for a mistrial, stating that "the inadvertent reference to a polygraph could be corrected by proper instructions from the court" (t-246). Counsel for codefendant Perkins, however, renewed his motion: "I feel that the harm done by this statement that was taken hinders any due process." (t-247). The trial judge then asked "All right gentlemen is there anything else?" (t-247) Counsel for defendant Johnson said nothing. The motion was granted. (t-247) On June 14, 1972, a motion to dismiss the charge against defendant Johnson on the ground that the mistrial was improperly declared was heard and denied. (t-248-252) The issue of double-jeopardy was again raised by defendant Johnson's new counsel prior to trial, and denied on the ground that the error at trial (the polygraph reference) was a defense error. After a partial empanelling of the jury codefendant Perkins pled guilty to the added count of assault with intent to rob and steal being unarmed, and was endorsed as a witness against defendant Johnson.

Defendant Johnson also pled guilty to the added count of assault with intent to rob and steal being unarmed, (plea transcript) and received a sentence of 5-15 years.

Defendant then appealed his conviction, and the Michigan Court of Appeals granted Petitioner's Motion to Affirm by an order entered November 21, 1973.

Respondent's Application for Leave to Appeal was granted by the Michigan Supreme Court on June 25, 1974. The Michigan Supreme Court reversed the conviction on April 21, 1976, per a 3-2 decision, the majority holding essentially that:

1. There was no consent to the granting of the mistrial by defendant Johnson, as absent an affirmative statement on the record such consent cannot be found.

2. The granting of the mistrial was not manifestly necessary.

3. "Following the lead of the United States Supreme Court," Defendant's plea of guilty did not waive the claim of double-jeopardy, as those claims which if successful would bar prosecution cannot constitutionally be said to be waived by a plea of guilty.

Petitioner's application for rehearing was denied on June 3, 1976.

REASONS FOR GRANTING THE WRIT

The Questions presented by petitioner are substantial Federal Constitutional issues which have yet to be fully addressed by this Court and which have been erroneously answered by the Michigan Supreme Court.

A.

The Michigan Supreme Court has ruled that "Wherever it is found that the result of the right asserted would be to prevent the trial from taking place, we follow the lead of the United States Supreme Court and hold a guilty plea does not waive that right."[1] The "lead" of this Court

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[1] There is no question but that the decision was based on the Federal Constitution. See 396 Mich at 430, fn 2.

which the majority opinion of the Michigan Supreme Court professed to be following is the recent per curiam decision of *Menna v New York*, ____ US ____; 96 S Ct 241; 46 L Ed 2d 195 (1975).

Menna involved a plea of guilty to an indictment for refusing to answer grand jury questions, after defendant Menna had already served a 30 day term for contempt of court for failing to answer the questions. The state conceded that the claim of double jeopardy was a strong one on the merits. Though holding that Menna's plea did not bar his raising the claim of double-jeopardy on appeal, this court said "we do not hold that a double-jeopardy claim may never be waived." Thus the question of what circumstances may constitute a waiver of the defense of double-jeopardy remains open.

In the instant case the plea was a bargained plea, as defendant was charged with armed robbery and pled to assault with intent to rob being unarmed. At the time of the plea, there were at least two issues related to double jeopardy the final resolution of which was unclear: 1) was there "manifest necessity" justifying the granting of the mistrial? (see the two-justice dissent in the Michigan Supreme Court); 2) Did defendant consent to the granting of a mistrial? By his voluntary, counseled, bargained plea of guilty defendant chose not to litigate the issues of manifest necessity and consent, and he should be held to that decision.

Petitioner submits that the per curiam decision of *Menna* (note that the Chief Justice and Justice Rehnquist would have granted the petition for a writ of certiorari and set the case for argument) has left open the question of how the defense of double-jeopardy may be waived, a question which needs to be answered, and has been

misconstrued by the Michigan Supreme Court to mean that if after a plea is taken a constitutional right is asserted, which if asserted and upheld prior to a trial would have prevented a trial from taking place, then the claim may be raised after plea, including such claims as:

> "the defense of double-jeopardy, these grounded in the due process clause, those relating to insufficient evidence to bind over at preliminary examination, and failure to suppress illegally obtained evidence without which the people could not proceed . . ."

Thus, following *Menna* the Michigan Supreme Court has found that the United States Constitution prevents viewing a guilty plea as waiving defenses which are concerned with the establishment of factual guilt, which are precisely those claims this court has said are rendered irrelevant by a plea of guilty. *Menna*, fn 2, citing *Tollett v Henderson*, 411 US 258; 36 L Ed 2d 235; 93 S Ct 1602 (1973); *Brady v United States*, 397 US 742; 25 L Ed 2d 747; 90 S Ct 1463 (1970); *McMann v Richardson*, 397 US 759; 25 L Ed 2d 763; 90 S Ct 1441 (1970). Petitioner urges that the writ should be granted so that the misconstruction of *Menna* may be remedied.

Petitioner also urges this Court to grant the petition for a Writ of Certiotari in order to re-examine the holding of *Menna*, which is contrary to the overwhelming weight of authority. See Bishop, Waivers in Pleas of Guilty, 60 F.R.D. 513 Fns. 85, 86, 202, p. 547, 557. In *Menna*, this Court stated that "where the state is precluded by the United States Constitution form haling a defendant into Court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna*,

46 Led 2d at 197. But this argument assumes its conclusion — how is the state to know that the plea of former jeopardy is a bar to prosecution until the defense is interposed and the issues litigated? Autrefois acquit and autrefois convict are, after all, *pleas in bar* to a criminal action. The people are not precluded from "haling into court" a person simply because that person has an assertable claim of former-jeopardy. Once charged the defense is asserted and the grounds on which it is based litigated. A guilty plea, particularly a bargained plea, is a choice not to litigate the double jeopardy issues (here manifest necessity and consent). The plea should bar review of the claim.

B.

Again purporting to follow a decision of this Court, the Michigan Supreme Court has held that consent by the defense to the granting of a mistrial, so as to preclude the raising of the defense of double-jeopardy upon retrial, cannot constitutionally be found absent a formal declaration on the record:

> "the United States Supreme Court has addressed this point as follows: 'The important consideration for purposes of the Double-Jeopardy Clause, is that the defendant retains primary control the course to be followed.' *United States v Dinitz* ___ US ___, ___ S Ct ___, ___ L Ed 2d ___ (1976), and the defendant must therefore do something positive in order to indicate he or she is exercising that primary control."

There is no statement or suggestion in *Dinitz* that consent can only be given by an affirmative statement on the record.

The rationale of the Michigan Supreme Court was stated thusly:

> "It is not difficult to require a trial Court to inquire whether defendant consents. Therefore, in the absence of an affirmative showing on the record, this Court will not presume to find consent." 396 Mich at 433.

However, the converse of the above proposition is equally logical — it is not difficult to require the defense to object to the granting of a mistrial; therefore, in the absence of an affirmative showing on the record, it will not be presumed that defendant objected. Postured in either manner, these propositions beg the constitutional question. Looking at these facts and circumstances, can it be said that defendant consented to the granting of a mistrial?

Counsel for defendant Johnson erroneously broached the issue of polygraph results. The prosecutor and counsel for the codefendant moved for a mistrial. Counsel for Johnson's only remarks were "I didn't realize it was improper" and "I feel kind of small." The next day the prosecutor withdrew his motion, but counsel for the codefendant insisted that a mistrial must be granted. Counsel for Johnson said nothing in the face of this motion. Before granting the motion the trial judge inquired, "All right, gentlemen, is there anything else?" Counsel for Johnson said nothing. Petitioner submits that there can be consent by silence, that there was in the instant case, and that such can be shown by analogy to

the doctrine of adoptive admissions (here a tacit admission). The general rule is that for silence to operate as an admission: 1) the party must have been capable of denying the truth of the assertion, and 2) the circumstances must have been such that a reasonable man would have denied the assertion. See *Donker v Powers*, 230 Mich 237, 202 NW 989 (1925).

Certainly under these facts a man who objected would not have remained silent.

Petitioner urges that it is clear that "defendant retained primary control over the course to be followed." The defense was not denied the opportunity to speak; on the contrary, further comment was invited. Certainly it cannot be said that the mistrial was the result of prosecutorial or judicial over-reaching. Neither did the defendant indicate any desire to continue the trial with the particular tribunal. The purposes underlying the double-jeopardy clause are not served by a ruling that consent to a mistrial can only be found consistent with the constitution where there is an affirmative declaration on the record.

It must also be remembered that consent to the granting of a mistrial is *not* a "waiver" by the defendant of his right not to be placed in jeopardy, so as to bring into play the knowing, intelligent, and voluntary standard of *Johnson v Zerbst*, 304 US 458; 82 L Ed 1461; 58 S Ct 1019 (1938):

> "This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right of counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right." (citation omitted).

Dinitz, 47 L Ed 2d 267, at 275 fn, 11.

Petitioner urges this Court to rectify the erroneous decision of the Michigan Supreme Court.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Supreme Court is in conflict with and misconceives decisions of this Court, and is in conflict with the Fifth and Fourteenth Amendments of the United States Constitution such that plenary review should be granted by the Court, and Petitioner's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney

By /s/ Timothy A. Baughman
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APPENDIX "A"

ORDER OF MICHIGAN COURT OF APPEALS

Division I

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Detroit, on the 20th day of November in the year of our Lord one thousand nine hundred and seventy-three.

Present the Honorable Vincent J. Brennan, Presiding Judge; John H. Gillis and George N. Bashara, Jr., Judges.

In this cause defendant-appellant has filed a brief on the merits in support of his appeal, and the plaintiff-appellee having filed a motion to affirm pursuant to GCR 1963, 817.5(3), and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion to affirm be, and the same is hereby, GRANTED.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 21st day of November in the year of our Lord one thousand nine hundred and seventy-three.

/s/ Ronald L. Dzierbicki
Clerk

APPENDIX "B"

OPINION OF THE MICHIGAN SUPREME COURT

(Filed April 21, 1976)

Before the Entire Bench [Except Lindemer and Ryan, JJ.] Williams, J.

In this case of first impression we consider the impact of a plea of guilty on the constitutional defense of double jeopardy. We hold that the defense of double jeopardy, as it affects whether a trial should have taken place at all, is not waived by a subsequent guilty plea. As this question is dispositive, we do not consider other issues raised by defendant, except we hold that the mere mention of a polygraph test without more does not constitute such manifest necessity as would justify a mistrial. We reverse the Court of Appeals and the trial court, and the defendant is discharged, as he was twice put in jeopardy, contrary to the mandate of the federal and Michigan constitutions.

I — FACTS

Defendant Alvin Johnson's first trial, with codefendant Eddie Perkins on the charge of armed robbery, ended in a mistrial, when, two days into the trial, Johnson's attorney asked a prosecution witness, a police officer:

> "Q. Didn't he [Alvin Johnson] deny he was implicated, involved in the alleged holdup?
>
> "A. Yes, he did.
>
> "Q. Did he also ask you whether or not he could submit to a lie detector test?"

The witness never answered as the prosecutor instantly objected and the jury was excused.

The people moved for a mistrial, maintaining:

> "The People would make a motion. Any reference to a lie detector test has to be prejudicial, and I would ask for a mistrial, with reluctance. No reference to a polygraph or lie detector test has been given. There has been no reference to that at all and is absolute grounds for a mistrial."

Perkins' counsel concurred. Johnson's counsel did not, maintaining, "All I can say is I didn't realize it was improper." He also noted, "I feel kind of small", but never directly commented one way or another on whether he would consent to a mistrial.

The Court took the motion under advisement and adjourned until the following day. When court reconvened, the prosecutor withdrew his motion, claiming "that the inadvertent reference to a polygraph could be corrected by proper instructions from the Court." Perkins' counsel, however, renewed his motion. "I feel that the harm done by this statement that was taken hinders any due process." The trial court granted the mistrial.

Before the second trial began, Johnson's counsel moved for dismissal on the grounds that the trial court abused its discretion in granting the mistrial. He maintained that the mere mention of the word polygraph would not be grounds for ending proceedings, that defendant's silence relative to mistrial signifies neither acceptance nor consent, and that consent must be

affirmatively and knowingly given, which did not occur in the case of Johnson or his counsel. Further, he suggested that the court might have granted a mistrial as to defendant Perkins, who requested it, and could have permitted the trial to continue as to defendant Johnson. While the court observed this was a unique idea, the motion was denied.

New counsel for Johnson subsequently moved to dismiss on double jeopardy grounds. The judge denied the motion on the ground of self-induced error by counsel for defendant Johnson.

Shortly after impanelling of the jury for the second trial began, codefendant Perkins pled guilty to an added count of assault with intent to rob and steal while being unarmed, and was endorsed as a witness to testify against Johnson. Johnson then pled guilty to the same added count and was sentenced to 5 to 15 years.

The Court of Appeals granted the prosecutor's motion to affirm the conviction. We granted leave, limited to "the question of whether the grant of a mistrial over defendant-appellant's objection barred subsequent prosecution under double jeopardy provisions of the Federal and state Constitutions". 392 Mich 756 (1974).

II — THE PROTECTION AGAINST DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution[1] and article 1, § 15 of the Michigan

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[1] The protection was held enforceable against the states through the Fourteenth Amendment in *Benton* v *Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

Constitution guarantee an individual against twice being put in jeopardy.[2]

> "The underlying idea [of the protection against double jeopardy] * * * is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v *United States*, 355 US 184, 187-188; 78 S Ct 221, 223; 2 L Ed 2d 199, 204 (1957).

Thus, once defendant has been placed in jeopardy,[3]

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[2] The guarantee has been said to protect against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *North Carolina* v *Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). The scope of the law of jeopardy is apparently the same under both the Michigan and United States Constitutions. *In re Ascher*, 130 Mich 545, 540; 90 NW 418; 57 LRA 806 (1902).

[3] "[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v *Jorn*, 400 US 470, 479; 91 S Ct 547, 554; 27 L Ed 2d 543, 553 (1971). "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. * * *In a nonjury trial, jeopardy attaches when the court begins to hear evidence." *Serfass* v *United States*, 420 US 377, 388; 95 S Ct 1055; 43 L Ed 2d 265 (1975). In the case of a guilty plea, jeopardy attaches when the sentence is imposed. *People* v *Burt*, 29 Mich App 275, 277; 185 NW2d 207 (1970).

unless he or she waives the defense,[4] or a mistrial occurs because of manifest necessity,[5] the state is precluded from bringing him or her to trial again. Even if defendant benefits from a mistrial called for reasons short of those necessary to satisfy the manifest necessity standard, reprosecution is still prohibited.[6] However, even where

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[4] " 'Constitutional immunity from second jeopardy is a *personal privilege* for the sole benefit of the accused, and it may be waived by the express consent or by implication from conduct indicative of consent or by failure to claim or assert the right in seasonable time.' [Emphasis added]" *Bass* v *State*, 489 P2d 1343, 1344 (Okla Cr, 1971), citing *Ex parte Kirk*, 96 Okla Cr 272; 252 P2d 1032 (1953). Incidentally, this case contrary to this opinion holds a guilty plea waives the double jeopardy bar.

[5] "Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by 'manifest necessity' or the 'ends of public justice.' " *Illinois* v *Somerville*, 410 US 458, 468; 93 S Ct 1066; 35 L Ed 2d 425 (1972).

> "Examples of situations where such a manifest necessity has been found to exist include cases where the jury is unable to agree; where the tactical situation of an army in the field dictates the dismissal of a court-martial; where the trial judge discovers that one or more jurors might be biased; and where a juror, or defendant becomes ill during trial, making his continued presence impossible." *People* v *Gardner*, 37 Mich App 520, 527-528; 195 NW2d 62 (1972).

[6] "Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action." *United States* v *Jorn*, 400 US 470, 483; 91 S Ct 547; 27 L Ed 2d 543 (1971).

> "We are not unmindful of the apparent irony in denying the trial court jurisdiction to proceed because of a ruling made, at least in part, ostensibly for the benefit of these petitioners. But we do not deal here with a mere technicality of the law: as the *Locklear* court explained* * *, 'Assuming a failure of justice in the instant case, it is outweighed by

(continued on next page)

the mistrial was improperly declared, it is not a bar to retrial if the action was taken with defendant's consent. *State* v *Fenton*, 19 Ariz App 274, 276; 506 P2d 665, 667 (1973).

Mere silence or failure to object to the jury's discharge is not such consent, 19 Ariz App 274, 276; 506 P2d 665, 667.[7]

In a very recent case in which defense counsel himself requested a mistrial, the United States Supreme Court has addressed this point as follows:

> "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be

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(continued from preceeding page)

> the general personal security afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power.' " *State* v *Locklear*, 16 NJ 232; 108 A2d 436, 442 (1954), quoted in *Curry* v *Superior Court*, 2 Cal 3d 707, 718; 87 Cal Rptr 361, 368; 470 P2d 345, 352 (1970).

[7] *Accord*, *Commonwealth* v *Baker*, 413 Pa 105, 115; 196 A2d 382, 387 (1964); *Curry* v *Superior Court*, 2 Cal 3d 707, 713; 87 Cal Rptr 361, 364; 470 P2d 345, 348 (1970).

See, also, *People* v *Carlton Brown*, 23 Mich App 528; 179 NW2d 58 (1970).

> "Silence cannot operate against a defendant." 23 Mich App 528, 534.

Contra, *Coppage* v *State*, 62 Okla Cr 325, 335; 71 P2d 509, 513 (1937).

> followed* * *", *United States* v *Dinitz*, ___ US ___, ___; ___ S Ct ___, ___; ___ L Ed 2d ___ (1976),

and the defendant must therefore do something positively in order to indicate he or she is exercising that primary control. Further,

> "The circumstance that it is defense counsel who initiates the court's inquiry into a matter which ultimately results in an order of mistrial does not ipso facto transform counsel's expression of concern into an implied consent to such drastic ruling." *People* v *Compton*, 6 Cal 3d 55, 62; 98 Cal Rptr 217, 221; 490 P2d 537, 541 (1971).

"[A]n appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision", *United States* v *Jorn*, 400 US 470, 483; 91 S Ct 547; 27 L Ed 2d 543 (1971). Thus, in the absence of brightline rules deliberately eschewed by the United States Supreme Court, 400 US 470, 486; 91 S Ct 547; 27 L Ed 2d 543, we must first look to whether in the exercise of that control of the course of his own trial, highlighted by *Dinitz*, defendant Alvin Johnson approved termination of the proceedings.

It is not difficult to require a trial court to inquire whether defendant consents. Therefore, in the absence of an affirmative showing on the record, this Court will not presume to find such consent.

There was no such affirmative showing in this case. At best, defense counsel may be said to have been silent. At worst, he did not protest, but he did not assent.

Therefore, we find that defendant did not personally consent to the end of the first trial. However, the finding of manifest necessity would still make the second trial permissible.

III — DID MANIFEST NECESSITY EXIST?

A judge has the power to abort a trial before a verdict is reached in order to prevent frustration of the ends of justice. Where "the ends of substantial justice cannot be attained without discontinuing the trial", *Gori* v *United States*, 367 US 364, 368; 81 S Ct 1523; 6 L Ed 2d 901 (1961), a mistrial declared for such "manifest necessity"[8] may be declared without defendant's consent,[9] and will not foreclose retrial even if it is over his or her objection.

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[8] The principle was first expressed by Justice Story in *United States* v *Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824), when writing for a unanimous court, he said:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

[9] "[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *United States* v *Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971).

367 US 364, 368. Because of its implications, this judicial discretion is properly exercised "only in very extraordinary and striking circumstances". *United States* v *Coolidge*, 25 Fed Cas 622, 623; 2 Gall 364, 365 (D Mass, 1815) cited in *Downum* v *United States*, 372 US 734, 736; 83 S Ct 1033; 10 L Ed 2d 100 (1963).

"A mere error of law or procedure * * * does not constitute legal necessity." *Curry* v *Superior Court*, 2 Cal 3d 707, 714; 87 Cal Rptr 361, 365; 470 P2d 345, 349 (1970). "[A] mistrial should not be declared in consequence of mere irregularities which are not prejudicial to the rights of the persons prosecuted." *People* v *Watson*, 307 Mich 596, 606; 12 NW2d 476 (1944).

The question of whether merely mentioning the term polygraph constitutes more than such a "mere irregularity" has been considered by our Court of Appeals. In *People* v *Paul F. Baker*, 7 Mich App 471, 476; 152 NW2d 43 (1967), Judge, now Chief Justice, Kavanagh, found that references to a polygraph test within the context of a particular case did not constitute reversible error and could be cured by relevant instructions to the jury.[10]

Cautionary instructions would be inadequate, the Court of Appeals has suggested, where testimony is admitted regarding refusal to take a polygraph test. *People* v *Tyrer*, 19 Mich App 48, 50; 172 NW2d 53 (1969).

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[10] "If evidence of the fact of a polygraph test be admitted or improper argument about it be made even though no objection to either be interposed, the court should instruct the jury as to the unreliability of such tests." 7 Mich App 471, 476.

Particularly helpful is *People* v *Paffhousen*, 20 Mich App 346, 350; 174 NW2d 69 (1969), where the complaining witness explained she had changed her story because "you don't fool a polygraph machine". The trial court denied counsel's motion for mistrial.

> "Defendant contends that the trial court erred in denying his motion for a mistrial. *To so hold would be tantamount to requiring a mistrial every time the word 'polygraph' is mentioned in a criminal prosecution.* It was not established that the complainant had submitted to a polygraph examination nor was an attempt made to introduce the results of any such examination. The word 'polygraph' was not used by counsel, but was volunteered by the witness. It was properly objected to, and the trial court properly ruled that the subject not be pursued any further. It was not, in fact, pursued, and no prejudicial error resulted." 20 Mich App 346, 351. (Emphasis added.)

In a case similar to that before us today, the Court of Appeals found reversible error barring retrial where the court did order a mistrial. *People* v *Maguire*, 38 Mich App 576; 196 NW2d 880 (1972).

During cross-examination of a detective by defense counsel, counsel asked:

> "Q. Did you know that Mr. Maguire [defendant] was challenged to submit to a lie detector test?" 38 Mich App 576, 578.

Before the witness responded, the prosecutor requested that the jury be excused. The judge granted a mistrial upon the prosecutor's request. 38 Mich App 576, 578, 580.

The Court of Appeals, "taking into account all of the circumstances of the case", 38 Mich App 576, 581, found the judge committed error. The panel noted, "There was no effort made by the judge to correct the statement by an instruction". 38 Mich App 576, 581. Also important was that "[t]his is not a case of continued improper activity on the part of defense counsel after a ruling by the trial judge, but rather, one isolated instance." 38 Mich App 576, 581. Further, the defense attorney did not ask for the mistrial, nor did he consent to it. 38 Mich App 576, 582. Under the circumstances, therefore, the court did not find such "manifest necessity which prevented the ends of public justice from being served by a continuation of the proceedings." 38 Mich App 576, 582.

A rule becomes clear, after reviewing the Court of Appeals' decision in *People* v *Brocato*, 17 Mich App 277; 169 NW2d 483 (1969), where they found a mistrial would have been appropriate. 17 Mich App 277, 292, fn 12. There, not only did the prosecutor insert the issue of a polygraph, 17 Mich App 277, 291, but he apparently deliberately contravened the court's warning to discontinue this approach.[11] 17 Mich App 277, 292. It is

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[11] This colloquy followed the trial court's warning that questioning about polygraph examinations was "treading on dangerous ground", 17 Mich App 277, 292:

> "Q. Miss Whitfield, one last question: In the process of your investigation of this case and to ascertain the truthfulness of Lana Jane Robinson, was she at any time — *get ready, Mr. Bucknell* (defense counsel) — offered a polygraph examination? (Emphasis supplied.)" 17 Mich App 277, 292.

clear that the Court of Appeals believed a mistrial was warranted because "[t]he prosecutor here made every conceivable effort to prevent the defendant from having a fair trial." 17 Mich App 277, 291. They noted:

> "It is rare indeed that an appellate court is confronted with such an openly disclosed intent on the part of a trial attorney to place before a jury improper and prejudicial testimony or such flagrant disregard of a ruling by the court." 17 Mich App 277, 292

Brocato was not a case of inadvertence, or of a single inappropriate question. Rather, it was part of a pattern of contumacious conduct on the part of the prosecutor. In the former instance, without a showing of prejudice, a mistrial would not be appropriate. In the latter, it certainly would be.

This is not true in the case before us. In the instant case, there was apparently an inadvertent question asked by defense counsel, which was instantly objected to, and therefore never answered. There was no overt effort to misuse the judicial system to prevent defendant from receiving a fair trial.

Under the circumstances, it does not appear that legal necessity existed for the discharge of the jury. The trial court ordinarily is in a superior position to determine when manifest necessity demands a mistrial, and must exercise its discretion to protect the ends of justice. Such discretion, however, should be exercised with the object of safeguarding defendant's double jeopardy protection. Because of the high value placed on defendant's not being required to undergo the discommodity of a second trial, the declaration of a mistrial should not be made

lightly, even when it is made ostensibly for the protection of defendant. The trial judge must always consider the possibility of curing error with a warning.[12]

In the instant case, we do not think sufficient prejudice was demonstrated to warrant a mistrial. We do not think the mention of a polygraph test, without more, was sufficient to justify granting a mistrial even to Perkins, who requested it, and certainly was not enough to support the mistrial as to defendant Johnson. A different issue might have arisen had the witness answered the question, but it is not necessary to resolve that matter now.

IV — EFFECT OF THE GUILTY PLEA

It is clear that in the instant case, defendant did not consent to the mistrial and it was not required by manifest necessity. Had the second trial not ended in a guilty plea, there is no question that it would have been

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[12] The California Supreme Court has presented some reasons why defendant might not opt for a mistrial.

> "A defendant may choose not to move for or consent to a mistrial for many reasons. He may be of the opinion that no error in fact occurred, or if it occurred, that it was not prejudicial. He may believe that any error in admitting improper evidence can be cured by a motion to strike or a request for admonition, or can be refuted by impeachment of the witness or contrary defense evidence. Indeed, even when a palpably prejudicial error has been committed a defendant may have valid personal reasons to prefer going ahead with the trial rather than beginning the entire process anew, such as a desire to minimize the embarrassment, expense, and anxiety mentioned above." *Curry* v *Superior Court*, 2 Cal 3d 707, 717; 87 Cal Rptr 361, 367; 470 P2d 345, 351 (1970).

improper as a violation of defendant's constitutional right against twice being put into jeopardy. The main question of the case now faces us and that is whether the guilty plea waived that constitutional right.

A. What Guilty Plea Waives

Clearly, the plea of guilty is itself an affirmative waiver of certain preconviction rights of the accused. See *Right to Appeal Plea Bargain Convictions*, 69 NW U L Rev 663, 664 and fn 3-6 (197). *People* v *Zunno*, 384 Mich 151, 156; 180 NW2d 17 (1970). The proper focus of Federal habeas corpus inquiry is the nature of the advice and voluntariness of the plea. *Tollett* v *Henderson*, 411 US 258, 267; 93 S Ct 1602; 36 L Ed 2d 235 (1973).[13]

Thus, in the guilty-plea trilogy of *Brady* v *United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970), *McMann* v *Richardson*, 397 US 759; 90 S Ct 1441; 25 L Ed 2d 763 (1970), and *Parker* v *North Carolina*, 397 US 790; 90 S Ct 1458; 25 L Ed 2d 785 (1970), and in *Tollett* v *Henderson*, *supra*, the United States Supreme Court

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[13] "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.' *McMann* v *Richardson*, *supra*, at 771. Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof. Thus, while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief." 411 US 258, 266-267.

recognized that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process.* * * [A Criminal defendant] may only attack the voluntary and intelligent character of the guilty plea* * *" 411 US 258, 267.

However, despite the apparently sweeping nature of this language, the Supreme Court has not construed the effect of guilty pleas to preclude contesting all constitutional rights.[14] The *Brady* trilogy and *Tollett* did not change the established principle that a guilty plea does not waive defendant's right to contest whether a statute under which he or she is accused is constitutional, *United States* v *Ury*, 106 F2d 28 (CA 2, 1939), or whether the information or indictment stated an offense, *Kolaski* v *United States*, 362 F2d 847, 848 (CA 5, 1966).

B. What the Guilty Plea Does Not Waive

Generally, however, the guilty plea waives all nonjurisdictional defects in the proceedings. See, *People* v *Ginther*, 390 Mich 436, 440; 212 NW2d 922 (1973). Why an accepted, unqualified[15] plea of guilty should cure error

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[14] Our own decisions have followed this lead. Thus, for example, a plea of guilty waives a claim of an illegally gained confession. *People* v *Catlin*, 39 Mich App 106, 108; 197 NW2d 137 (1972). *But* see, *People* v *Millard*, 394 Mich 99; 228 NW2d 783 (1975) for indication that a guilty plea does not waive all preconviction rights of the accused.

[15] As for defendant's qualified plea, the federal circuits have apparently split as to whether defendant may plead guilty while preserving the right to raise on appeal constitutional challenges to evidence. *See*, e.g., *United States* v *Cox*, 464 F2d 937, 945 (CA 6, 1972).

> "In sum, while we can see that the proposed procedure [allowing defendant to plead guilty, contingent on his right to appeal on non-jurisdictional grounds from his own plea] may

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that a guilty verdict or finding would not[16] probably been best answered by the Supreme Court's observation that a guilty plea is different "in purpose and effect from a mere admission or an extra-judicial confession, it is itself a conviction." *Kercheval* v *United States*, 274 US 220, 223; 47 S Ct 582; 71 L Ed 1009 (1927). Thus, in the case of a guilty plea, the conviction is based not on possibly tainted evidence, but on defendant's admission in open court.

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> ease the docket pressures confronting many district courts, we believe the disadvantages in terms of the internal consistency of our criminal process, the accuracy of appellate review, and conflict with the hoary doctrine of avoiding constitutional questions if possible, far outweigh the putative gains."

Contra, *United States* v *Caraway*, 474 F2d 25, 28-29 (CA 5, 1973), opinion vacated as moot, 483 F2d 215 (CA 5, 1973) (involving a plea of nolo contendere, the legal equivalent of a guilty plea).

> "Our rationale for recognizing this type of express agreement is two-fold. First, we are reluctant to establish a rigid rule requiring a defendant to undergo the costly and futile ordeal of a complete trial, when the State could easily prove its case by the evidence claimed to be illegally obtained and by no other evidence, and the defendant merely seeks to preserve a single, nonjurisdictional issue* * *. Second, of the combine requisites, 'voluntariness' and 'intelligence'* * *for equivalence to a valid guilty plea, a *nolo* plea, conditioned on right to appellate review of a motion to suppress evidence, might now* * *meet the test of being 'voluntary,' but the conditioning of the plea on a right to appellate review demonstrates that it was not so 'intelligently' entered as to waive deprivation of the nonjurisdictional defect sought to be reviewed; and more especially so, where, at the time of pleading, the practice of the reviewing court is to honor such a condition allowed by the trial court." (Citations omitted.)

[16] As we observed in *People* v *Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973), while one might find waiver of the right to appeal alleged constitutional violations as part of the consideration for permitting a plea of guilty to a lesser offense. "[p]utting aside the legitimacy of such consideration, all pleas are not bargained pleas." (Notes omitted.)

> "A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. * * * The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment* * *." *McMann* v *Richardson*, 397 US 759, 773; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

The Court has, itself, however, recognized that the double jeopardy defense is different from the *McMann* type of defenses qualitatively. In *Robinson* v *Neil*, 409 US 505, 509; 93 S Ct 876; 35 L Ed 2d 29 (1973), Justice Rehnquist, speaking for a unanimous court, distinguished this protection from others, such as the *Mapp* v *Ohio* exclusionary rule, designed to deter unlawful police conduct.

> "While this guarantee [double jeopardy]* * *is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial."

Thus, the right is closer to those which were untouched by *Brady, et al.*, such as the right to challenge the constitutionality of the statute under which the state proceeded, which may be asserted even after a plea of guilty. Defendant may always challenge whether the state had a right to bring the prosecution in the first place.

The first application of this approach came when the Supreme Court, in *Blackledge* v *Perry*, 417 US 21, 31; 94

S Ct 2098; 40 L Ed 2d 628 (1974), applied the *Robinson* double jeopardy reasoning to find that a guilty plea did not foreclose a defendant from collaterally raising a due process right in attacking a plea-based conviction in federal habeas corpus proceedings.

First, the Court distinguished the due process right from those in the *Brady* trilogy and *Tollett*.

> "Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him.* * *In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett*, Perry is not complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.' 411 US at 266, 267. Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge." 417 US 21, 30.

Then, using the *Robinson* double jeopardy reasoning, and applying it to the due process clause, the Court found:

> "While our judgment today is not based upon the Double Jeopardy Clause, we think that the [Robinson double jeopardy clause] language aptly describes the due process right upon which our judgment *is* based. The 'practical result' dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus." 417 US 21, 31.

The foundation laid in *Blackledge* was completed by the Supreme Court in its per curiam opinion in *Menna* v *New York*, ___ US ___; 96 S Ct 241; 46 L Ed 2d 195 (1975). There, citing *Blackledge*, the Court rejected the state's reliance on *Tollett* and held that a guilty plea did not waive the double jeopardy defense.

> "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." ___ US ___.

Thus, it is clear that the United States Supreme Court, while recognizing that certain rights of defendant may be waived by a subsequent plea of guilty, does not say that is true of all rights. Certainly it is true that those rights which might provide a complete defense to a criminal prosecution, those which undercut the state's

interest in punishing the defendant,[17] or the state's authority or ability to proceed with the trial may never be waived by guilty plea.[18] These rights are similar to the jurisdictional defenses in that their effect is that there should have been no trial at all. The test, although grounded in the constitution, is therefore a practical one. Thus, the defense of double jeopardy, those grounded in the due process clause, those relating to insufficient evidence to bind over at preliminary examination and failure to suppress illegally-obtained evidence without which the people could not proceed are other examples. Wherever it is found that the result of the right asserted would be to prevent the trial from taking place, we follow the lead of the United States Supreme Court and hold a guilty plea does not waive that right.

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[17] *E.g., United States* v *Liguori*, 430 F2d 842, 848-849 (CA 2, 1970), *cert den*, 402 US 948; 91 S Ct 1614; 29 L Ed 2d 118 (1971), where there was no governmental interest in seeing defendant punished, since it was the statutory scheme which violated the privilege against self-incrimination. "Where the state's interest in punishing the defendant's conduct is lacking, the plea as an admission becomes meaningless, for it cannot bestow upon the state the authority to prosecute or punish the defendant." Shwartz, *The Guilty Plea as a Waiver of Present but Unknowable Constitutional Rights: The Aftermath of the Brady Trilogy*, 74 Col L Rev 1435, 1462 (1974).

[18] "The federal courts have stated that one can never waive a jurisdictional defect.* * * For a court to have jurisdiction, there must be a valid indictment or information, substantiated by sufficient legal evidence to show the accused probably committed the crime with which he is charged." Mullady, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 Houston L Rev 305, 314 (1971). (Notes omitted.)

V — CONCLUSION

Defendant Alvin Johnson's first trial ended in an improperly called mistrial. Thus, defendant was placed in jeopardy twice in violation of his constitutional right. Because this right goes to the very heart of the government's ability to place defendant on trial, the subsequent guilty plea does not foreclose defendant from raising this defense. We therefore find that since the second trial should not have taken place at all, the conviction may not stand and defendant must be released.

The Court of Appeals and the trial court are reversed.

/s/ G. Mennen Williams

/s/ Thomas Giles Kavanagh

/s/ Charles L. Levin

Dissenting Opinion

Before the entire bench (Except Lindemer and Ryan, JJ.) M.S. Coleman, J. (Dissent)

I disagree with the reasoning in support of my colleagues' decision to set aside a guilty plea and dismiss defendant from court jurisdiction.

Two days into a joint trial, the prosecutor objected to a question by defendant's counsel and made a motion for a mistrial. Although the prosecutor withdrew his objection and motion co-defendant Perkins demanded a mistrial, saying, "I feel that the harm done by this statement that was taken hinders any due process". Defense counsel remained silent, neither objecting to nor requesting a mistrial, but saying "All I can say is I didn't realize it was improper" and "I feel kind of small".

Mistrial was granted. A second joint trial on the armed robbery charge was begun over defendant's claim of double jeopardy. After the jury was impanelled, defendant pled guilty to an added count of assault with intent to rob and steal while being unarmed. (This was after his codefendant had pled guilty to the same charge.)

Now defendant claims (1) that the order of mistrial was improper, and (2) therefore, he could neither be tried on the original charge nor could he plead guilty to the reduced charge. He claims that the defense of double jeopardy is not waived by a plea of guilty.

This dissent is neither in agreement nor disagreement with the latter claim. Instead, it is directed to the conclusion that the order of mistrial was invalid in the first instance.

With the codefendant demanding mistrial, the judge had cause to believe that he could not win regardless of

what he did. He chose to accede to codefendant's motion for mistrial under the circumstances.

The majority would find that the judge chose erroneously and would free defendant.

The cases relied upon by the majority are inapposite. All refer to a prosecutor's motion or a judge's *sua sponte* declaration of mistrial.

For instance, the majority quotes from *Gori v United States*, 367 US 364; 81 S Ct 1523; 6 L Ed 2d 901 (1961), but does not relate the essence of that decision.

In *Gori*, defendant was in the first day of a jury trial when the judge, *on his own motion*, declared a mistrial. Defendant was silent, neither objecting nor approving. The Supreme Court stated that reasons for the mistrial were unclear although the trial judge may have acted because of questioning by the prosecutor bringing out other crimes of defendant. The Court agreed with the Court of Appeals in characterizing the judge's action:

> "In any event, it is obvious, as the Court of Appeals concluded, that the judge 'was acting according to his convictions in protecting the rights of the accused.' 282 F2d, at 46. The court below did not hold the mistrial ruling erroneous or an abuse of discretion. It did find the prosecutor's conduct unexceptionable and the reason for the mistrial, therefore, not 'entirely clear'. It did say that 'the judge should have awaited a definite question which would have permitted a clear-cut ruling', and that, in failing to do so, he displayed an 'overzealousness' and acted 'too hastily'. Id., at 46, 48."

Gori, supra, at 366.

The Court commented on the role of the trial judge in declaring a mistrial re Fifth Amendment concerns:

> "*Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision,* the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.
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> * * *
>
> "It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . ,' *Brock v North Carolina,* 344 US 424, 427 [73 S Ct 349; 97 L Ed 456, 459 (1953)] and that *we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion.*" (Emphasis added.)

Gori, supra, at 368.

Gori states the better rule to follow under the instant facts which are distinguishable from those leading to the conclusion as to that defendant. Here codefendants are involved rather than a single defendant, and the codefendant made the motion for mistrial rather than the judge *sua sponte*. Further, the rationale of *Gori* carries over to the instant case: (1) The trial judge is best situated to make a decision on whether a mistrial is necessary to achieve the ends of justice. (2) Although the mistrial was not "in the sole interest of the defendant", Johnson, there were two defendants and the codefendant was equally interested. He demanded a mistrial, so the

trial judge could reasonably find that the ends of justice required a mistrial. (3) Although reference to a polygraph may not be reversible error in every case, the judge's declaration of a mistrial would at least appear to be the product of the trial judge's solicitude and in the sole interest of the defendants.

Moreover, the general underlying rational for defense of double jeopardy does not exist in the instant case.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the *State with all its resources and power should not be allowed to make repeated attempts to convict* an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (Emphasis added.)

Green v United States, 355 US 184, 187-188; 78 S Ct 221, 223; 2 L Ed 2d 199, 204 (1957).

> "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment — cases in which the defendant would be harrassed by *successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused.*" (Emphasis added.)

Gori, supra, at 369.

In the instant case, the mistrial was declared on motion of the codefendant, not the prosecutor.

In an effort to avoid reversal on appeal, the trial judge in the instant case may have "bent over backwards" on behalf of the defendants in declaring a mistrial. However, careful judges are learning that they cannot be too careful — or can they?

Justice Frankfurter's comment in *Gori* at 369 applies equally to the majority opinion in the instant case:

> "[*W*]*e are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial.* It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis." (Emphasis added.)

In the recent case of *United States v Dinitz*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (1976), defendant was represented by several attorneys. The trial judge excluded the attorney in charge of the trial because of his repeated improper actions during the opening statement. The judge set three alternatives for the defendant: (1) Stay or recess pending Court of Appeals review on expulsion of the attorney; (2) continuation of the trial with the remaining attorneys, or (3) declaration of a mistrial so defendant could get new counsel. A remaining attorney moved for a mistrial after consulting with defendant. It was not opposed by the prosecutor and was granted by the judge.

Before the second trial, defendant unsuccessfully moved for dismissal of the indictment on double jeopardy grounds. His subsequent conviction was reversed by the Court of Appeals on double jeopardy grounds because defendant was given no choice but to ask for a mistrial. The Court of Appeals treated the case as a declaration of mistrial over defendant's objection, ignoring his request for mistrial. Therefore, it was said that double jeopardy barred the second trial because there was no manifest necessity.

The United States Supreme Court reversed, holding that defendant did request a mistrial.

The Court of Appeals had based its holding on a waiver theory, saying that when defendant requests a mistrial he waives his right to be tried by the first jury. Therefore, it was said that defendant did not voluntarily waive because the trial judge did not present enough alternatives — he was left with no choice other than mistrial.

The Supreme Court held that the waiver theory does not apply — defendant is always faced with a "Hobson's choice" in deciding whether to respond to judicial or prosecutorial error with a mistrial request. He must give up the first jury or continue in a trial which may contain error. The Court said that the inquiry should be *whether "defendant retains primary control over the course to be followed in the event of such error". Dinitz, supra,* at ___. (Emphasis added.)

Dinitz is not on "all fours" with the instant case, but the cases are similar because the complaining defendant's attorney in each case committed possible error during trial. In *Dinitz*, the judge took his action upon objection from the prosecutor and a resulting request for mistrial by defendant. In the instant case, the trial judge declared a mistrial at the request of the codefendant.

However, the basic theory of *Dinitz* applies equally to the instant appeal.

We must examine the circumstances surrounding the declaration of mistrial to discover whether defendant had primary control. Defendant's attorney asked the objectionable question, codefendant's attorney strongly objected and asked for a mistrial, and defendant's attorney essentially apologized, saying, "[a]ll I can say is I didn't realize it was improper" and, "I feel kind of small". The court, on these facts, could find that defendant consented to the mistrial. Defendant had interests similar to those of the objecting codefendant and he apologized for the problem caused by his own question. Considering these facts, defendant had control over the events and, in the absence of a specific objection or denial of error at the time, the trial court could properly determine that defendant joined with the codefendant in seeking a mistrial.

The majority opinion states that "defendant must therefore do something positively in order to indicate he or she is exercising that primary control". However, *Dinitz* contains no such language. The proper inquiry, simply stated, is whether defendant had primary control. A reviewing court my examine the totality of the circumstance in considering whether such control existed. The totality of the instant facts reveal control. Defendant need not raise a red flag.

Finally, we note comments by the United States Supreme Court concerning the result which Justice William's opinion inevitably brings about:

> "[It] * * * undermines rather than furthers the protections of the Double Jeopardy Clause. In the event of severely prejudicial error a defendant might well consider an immediate new trial a preferable alternative to the prospect of a probable conviction followed by an appeal, a reversal of the conviction, and a later retrial. Yet the Court of Appeals' decision, in effect, instructs trial judges to reject the most meritorious mistrial motion in the absence of manifest necessity and to require, instead, that the trial proceed to its conclusion despite a legitimate claim of seriously prejudicial error. For if a trial judge follows that course, the Double Jeopardy Clause will present no obstacle to a retrial if the conviction is set aside by the trial judge or reversed on appeal. *United States v Ball*, 163 US 662." *Id.*

In this case, it also results in one codefendant convicted and another released after guilty pleas by each to identical offenses. Gamesmanship prevailed again.

I would affirm the conviction.

/s/ Mary S. Coleman

/s/ John W. Fitzgerald